IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

3601 GROUP, INC., a Washington corporation, Respondent/ Cross-Appellant, v. ALFALFA'S NORTHWEST, INC., a Colorado corporation; ALFALFA'S, INC., a Colorado corporation; and WILD OATS MARKETS, INC., a Delaware corporation, Appellants/ Cross-Respondents.	)	No. 59237-8-I DIVISION ONE UNPUBLISHED OPINION FILED: February 11, 2008

AGID, J.—This case involves the termination of a commercial lease for a grocery store space in Fremont and the ensuing litigation. The original trial court awarded partial summary judgment on liability in the lessor's favor and held a trial solely on damages, the result of which was appealed to and reversed by this court. This is an appeal of the second jury's verdict on remand. The lessee argues that damages awarded to the lessor were excessive and challenges a number of rulings, including the original summary judgment determination. We hold that (1) the law of the case doctrine

prevents us from considering a summary judgment determination in a second appeal after remand that could have been determined in the first appeal; (2) the record does not support the lessee's claims that the trial court abused its discretion by admitting certain exhibits or denying its motion for a new trial; and (3) the court's award of interest was appropriate under the contract. We affirm and award the lessor attorney fees and costs for both this appeal and its previous appeal.

FACTS

3601 Group, Inc. (3601 Group) sued Alfalfa's Northwest, Inc. (Alfalfa's),[1] for breach of its lease for a commercial space in Fremont. The trial court granted partial summary judgment in favor of 3601 Group on the issue of liability. There was a jury trial on the issue of damages that resulted in a negative damages finding. 3601 Group appealed, and this court reversed based on instructional error.[2] Most of the salient facts about the parties and the lease have already been set out in the earlier unpublished opinion. The evidence adduced at the second trial appears to be largely the same as at the first trial with the exception of the evidentiary issues challenged in this appeal. Consequently, we address only the facts from the second trial relevant to this appeal.

At the second trial, the court admitted three exhibits not admitted at the first trial. Exhibits 71 and 72 were invoices, checks, and receipts related to 3601 Group's claimed

[1] 3601 Group also sued Wild Oats Markets, Inc., because it is the surviving corporation after a merger with Alfalfa's. In the interests of clarity, we refer to both corporations collectively as Alfalfa's because the suit is based on actions taken by Alfalfa's before the merger.

[2] 3601 Group, Inc. v. Alfalfa's Nw., Inc., noted at 119 Wn. App. 1036 (2003), review denied, 152 Wn.2d 1017 (2004).

damages for tenant improvements. Exhibit 68 was a spreadsheet summarizing 3601 Group's damage calculations. The second jury awarded 3601 Group $236,209.09 in damages. The court denied Alfalfa's motion for judgment notwithstanding the verdict (JNOV) or a new trial and awarded $302,710 in interest under the contract. It also awarded 3601 Group attorney fees for the first and second trials, but deferred the issue of attorney fees from the first appeal to this court.

DISCUSSION

I. Summary Judgment

Alfalfa's asks this court to determine whether the original trial court erred in granting partial summary judgment in favor of 3601 Group on the issue of liability. Because Alfalfa's did not cross-appeal on this issue in the first appeal and the trial court did not reconsider the issue on remand, we decline to consider this argument.

Generally, the law of the case doctrine prevents this court from considering issues raised in a second appeal after remand that could have been determined in the first appeal.[3] RAP 2.5(c)(1) allows for review of a previously undisputed issue after remand only if that issue is "otherwise properly before the appellate court." The Washington Supreme Court explained when an issue is properly before the appellate court under RAP 2.5(c)(1) in State v. Barberio:

> This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.[4]

[3] State v. Tili, 148 Wn.2d 350, 382, 60 P.3d 1192 (2003) (citing Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988)).

[4] 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

In its reply brief, Alfalfa's concedes that Barberio correctly explains the law of the case doctrine but attempts to argue that the second trial court implicitly reviewed and ruled again on the propriety of granting summary judgment by excluding evidence of breach based on the earlier summary judgment decision. But a decision to exclude evidence of breach at a second trial, because liability was already determined as a matter of law on summary judgment, is not a reconsideration of the summary judgment determination requiring exercise of the second court's independent judgment. In Barberio, the court clearly stated that, for a previously unappealed issue to become appealable after remand, the second trial court must explicitly decide to review the issue. Even allowing some argument from counsel is insufficient to revive the issue if the second court chooses to rely on the initial court's determinations without exercising its own independent judgment.[5] Here, the second trial court clearly relied on the original court's summary judgment ruling. Thus, it is the law of the case, and we decline to consider it here.

II. New Evidence

We review a trial court's decision to admit evidence for an abuse of discretion.[6]

[5] 121 Wn.2d at 51-52.

[6] Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107, 864 P.2d 937 (1994). Alfalfa's tries to argue that this court should apply a de novo standard when reviewing evidentiary rulings that raise more substantive issues. None of the authority it cites supports this contention. Alfalfa's cites two criminal cases to support its argument without providing pinpoint citations. But both cases stand for the proposition that, while evidentiary rulings are reviewed for an abuse of discretion, if those decisions are based on a question of law, that question of law is reviewed de novo. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (whether a statement is hearsay is a question of law reviewed de novo); State v. Lough, 70 Wn. App. 302, 313 n.5, 853 P.2d 920 (1993) ("when reviewing a question of 'law', if an appellate court determines that the trial court applied the law incorrectly, then it abused its discretion, and its decision will be overturned"), aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995).

This court will reverse evidentiary rulings only if they are based on untenable grounds or made in a manifestly unreasonable manner.[7]

Alfalfa's contends that, on remand, the trial court erred by admitting exhibits 71 and 72 because they were excluded in the first trial. Although only a short excerpt from the original trial has been designated as part of the record for this appeal, it appears that the original trial court excluded the exhibits because 3601 Group failed to include them in the exhibit list it provided to Alfalfa's under former King County Local Rule (KCLR) 16(a)(3).[8] On remand, the trial court decided to admit the previously excluded exhibits because the violation had been cured:

> I am going to allow both 71 and 72 on this basis because this time around they were listed. That overcame [the original trial court's] problem with them . . . I think the opportunity was there to discover them. That is all that is required.

In its appellate brief, Alfalfa's cites no authority to support its contention that this ruling was erroneous. But, for the first time in its reply brief, Alfalfa's argues that the law of the case doctrine should have precluded the second trial court from admitting exhibits excluded by the original trial court. Because this court will not consider arguments that are unsupported by authority or raised for the first time in a reply brief, we decline to consider this issue further and affirm the trial court.[9]

Alfalfa's also challenges the court's admission of exhibit 68,[10] an amended

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[7] Id.

[8] Former KCLR 16(a)(3)(2002), which was in effect at the time, has since been recodified as KCLR 16(a)(4).

[9] See RAP 10.3; Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); City of Woodinville v. Northshore United Church of Christ, 139 Wn. App. 639, 663, 162 P.3d 427 (2007). And, as our discussion of the law of the case doctrine above indicates, the issue was revived and can be reconsidered.

[10] We refer to exhibit 68 because it is the designation used by the parties. In fact, 68

version of the damages spreadsheet offered by 3601 Group at the original trial.[11] Alfalfa's contends that allowing this exhibit was an abuse of discretion because it was given no opportunity to refute the exhibit's numbers through discovery. Because Alfalfa's cites no authority to support this contention, we need not consider it.[12] Additionally, it appears that Alfalfa's waived any initial objection by failing to object when exhibit 157, a revised version of exhibit 68, was admitted to replace exhibit 68:

> MR. KRIKORIAN: Are we going to use Exhibit 68, the one I proposed?
> THE COURT: Yes. So I will, at this point, I will ask you, do you have any objection, counsel?
> MR. ROMERO: I think we should mark it as a new number only because the record would be really goofy with people talking about it the whole time. But in terms of the concept of saying here is a new exhibit with new numbers, it is just a reduction of things.
> . . . .
> [THE COURT:] . . . We have had some conversation or some testimony, some discussion of a spread sheet that was designated as Exhibit 68. Based upon our discussions and some legal rulings by the court, that Exhibit has been revamped and it will be now referred to as Exhibit 157.

Finally, Alfalfa's objections to exhibit 68 lack merit. Alfalfa's made two objections to the admission of exhibit 68. First, it argued there was a lack of foundation because the exhibit was introduced through Daniel Cawdrey, the Vice President of 3601 Group, instead of the expert who created it. But Cawdrey testified that he created it, and Alfalfa's provided no evidence to the contrary. In fact, the expert's testimony at the original trial was that Cawdrey was involved in the creation of the spreadsheet.

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was revised and admitted as exhibit 157.

[11] Alfalfa's did not designate the original exhibit as part of the record on appeal. But it appears from the limited portion of the original trial record included in 3601 Group's motion to supplement the record that this exhibit was excluded at the original trial, although 3601 Group's expert was allowed to testify about the damages included in the proposed exhibit.

[12] See RAP 10.3(a)(6); Cowiche Canyon Conservancy, 118 Wn.2d at 809.

Second, Alfalfa's argued that admission of exhibit 68 violated a previous trial court judge's partial grant of a motion in limine to exclude evidence not disclosed in discovery. But the order granting the motion in limine does not support this contention. On the contrary, it specifically reserves the issue of whether 3601 Group will be able to offer or elicit testimony related to exhibit 68 for trial. Finally, Alfalfa's principal basis for objecting to exhibit 68 on appeal—that it was not allowed any additional discovery in order to refute the exhibit—is negated by the trial court's oral ruling allowing limited additional discovery. Nothing in the record supports Alfalfa's contention that the trial court abused its discretion by admitting exhibit 157, a revised version of exhibit 68.

III. Judgment as a Matter of Law or New Trial

Alfalfa's contends that the trial court erred by denying its motion for judgment as a matter of law[13] or a new trial. In its order denying the motion, the court addressed only Alfalfa's request for a new trial under CR 59. The court likely chose not to address whether Alfalfa's was entitled to judgment as a matter of law under CR 50 because that motion was untimely. CR 50 was amended in 2005 to require that parties move for judgment as a matter of law before the case is submitted to the jury.[14] Thus, Alfalfa's failure to move for judgment as a matter of law before the case was submitted to the jury precluded it from renewing a CR 50 motion after the verdict. We therefore need only review the trial court's denial of Alfalfa's CR 59 motion for a new trial.

We review a trial court's decision denying a motion for a new trial for abuse of

[13] Although Alfalfa's requested a JNOV, because JNOV has been replaced by judgment as a matter of law in Washington under CR 50, we refer to this as a motion for judgment as a matter of law. Goodman v. Goodman, 128 Wn.2d 366, 368 n.1, 907 P.2d 290 (1995).

[14] Mega v. Whitworth College, 138 Wn. App. 661, 668, 158 P.3d 1211 (2007).

discretion.[15] CR 59(a) lists the grounds for granting a new trial. Alfalfa's relies on three of the nine grounds listed, CR 59(a)(5)-(7).

CR 59(a)(5) allows for a new trial when damages are "so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice." Because Alfalfa's makes no argument and cites no authority to support its assertion that it is entitled to a new trial under CR 59(a)(5), we decline to consider this contention.[16]

CR 59(a)(6) permits a court to order a new trial when there is an "[e]rror in the assessment of the amount of recovery" and "the action is upon a contract." Alfalfa's argues that the court erred in allowing the jury to calculate late fees because the manner for assessing late fees was provided in the lease and, thus, should have been determined by the court. Because nothing in the lease requires a court to determine the appropriate amount of late charges and Alfalfa's cites no case law to support the proposition that it is error for a jury to determine late charges provided for by contract, we need not consider this contention further.[17]

The heart of Alfalfa's argument is that the trial court should have granted it a new trial under CR 59(a)(7) because there is "no evidence or reasonable inference from the evidence to justify the verdict." Specifically, Alfalfa's argues that the evidence does not support the jury's special verdict findings for the cost of tenant improvements for later tenants and lost parking rent.

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[15] Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 176 n.6, 116 P.3d 381 (2005) (citing Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997)).

[16] See RAP 10.3(a)(6); Cowiche Canyon Conservancy, 118 Wn.2d at 809.

[17] Id.

A trial court abuses its discretion when it denies a motion for a new trial "where the verdict is contrary to the evidence."[18] We evaluate whether substantial evidence supports the jury's verdict, viewing the evidence in the light most favorable to the nonmoving party.[19] In reviewing the evidence, we do not reweigh it, draw our own inferences, or substitute our judgment for that of the jury.

> "[E]ven if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered."[20]

The trial court is in a better position than an appellate court to determine whether a new trial should be granted.

> The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents. The appellate court, on the other hand, is tied to the written record and partly for that reason rarely exercises this power.[21]

The trial court's denial of a motion for a new trial strengthens the verdict.[22]

The jury found that 3601 Group incurred $1,437,112 in damages for tenant improvements for later tenants. It based this figure on a total tenant improvement damages calculation of $1,650,967 minus $213,855 for failure to mitigate. Alfalfa's argues that there is no evidence to support this damages award because the lease between 3601 Group and the tenant for whom the bulk of the tenant improvement costs

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[18] Palmer, 132 Wn.2d at 198.

[19] Kohfeld v. United Pac. Ins. Co., 85 Wn. App. 34, 41, 931 P.2d 911 (1997).

[20] Burnside v. Simpson Paper Co., 123 Wn.2d at 108 (emphasis omitted) (quoting State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)).

[21] Bingaman v. Grays Harbor Comm'ty Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) (footnote omitted).

[22] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 330, 858 P.2d 1054 (1993).

were allegedly incurred limits the work for which 3601 Group is responsible. And, it asserts, the only evidence supporting their claimed costs—the checks included in exhibit 72—does not support such a significant award. But this was not the only evidence provided on the issue of tenant improvement costs. 3601 Group also submitted exhibit 157, claiming tenant improvement costs of $1,804,736. Cawdrey testified that, although the lease with a later tenant limited 3601 Group's tenant improvement costs, other costs had been incurred before that lease period to prepare the premises. This evidence is sufficient to support the jury's tenant improvements damages finding. The contradictory evidence Alfalfa's presented goes to the weight the jury should have given 3601 Group's evidence, and we cannot reweigh it.

Alfalfa's also contends the evidence does not support the jury's award of $89,800 in lost rent for parking because no parking lease agreement was reached. Specifically, Alfalfa's argues that the jury could not consider lost parking rents as an element of damages without a preliminary finding by the trial court that there was a parking agreement. But, by giving the jury a special verdict form that included a space for determining "[l]oss of rent related to under-utilization of parking spaces" the court clearly included lost parking rent as a potential element of damages for the jury to decide. Alfalfa's did not object to including lost parking rent damages on the special verdict form. As such, Alfalfa's waived the issue and cannot raise it on appeal.[23]

[23] See CR 51(f); Queen City Farms, Inc. v. Ctr. Nat'l Ins. Co., 126 Wn.2d 50, 63, 882 P.2d 703, 891 P.2d 718 (1994) (special verdict forms are analogous to jury instructions); Peterson v. Littlejohn, 56 Wn. App. 1, 11, 781 P.2d 1329 (1989) (failure to object to a jury instruction at trial results in waiver on appeal) (citing Ryder's Estate v. Kelly-Springfield Tire Co., 91 Wn.2d 111, 587 P.2d 160 (1978); see also Guijosa v. Wal-Mart Stores, 144 Wn.2d 907, 32 P.3d 250 (2001) ("Instructions to which no exceptions are taken become the law of the case.") (citing Ralls v. Bonney, 56 Wn.2d 342, 343, 353 P.2d 158 (1960)).

IV. Interest

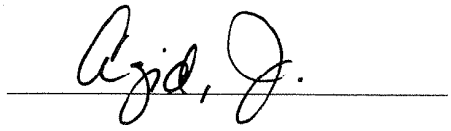
Alfalfa's attempts to argue that the trial court erred by awarding prejudgment interest on an unliquidated sum. This is a mischaracterization of the award. The trial court awarded 3601 Group $302,710 in interest under the contract.[24] Because this award is properly characterized as contractual damages, not statutory prejudgment interest, Alfalfa's liquidation argument is misplaced.

[24] In its reply in support of its motion for JNOV or a new trial, Alfalfa's characterizes the interest award as contractual.

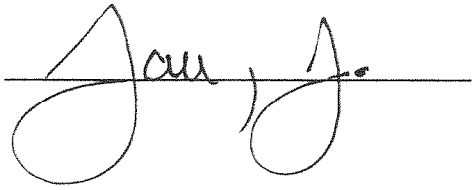
V. Attorney Fees

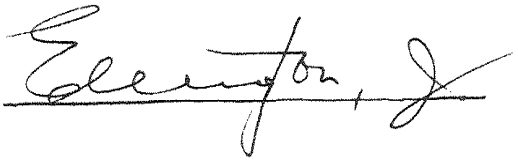
3601 Group requests attorney fees under RAP 18.1 for both this appeal and its 2003 appeal. RCW 4.84.330 mandates "an award of reasonable attorney's fees to the prevailing party where a contract so provides."[25] Because the lease involved in this case contains an attorney fees provision, we hold that 3601 Group is entitled to recover its reasonable attorney fees and costs for both appeals subject to compliance with RAP 18.1(d).

We affirm.



WE CONCUR:





[25] Singleton v. Frost, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987).